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No. 85-1327

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

HARDAWAY CONSTRUCTORS, INC.,

Petitioner,

v.

JOSEPH DANIEL BROWNING, JR.,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Assuming that the doctrine of collateral estoppel does not preclude relitigating the issue of employee status because of a previous judicial determination of that issue, whether a highway bridge construction worker killed on a fixed platform in navigable waters, who was admittedly engaged in longshoring operations (unloading one of his employer's vessels, a barge) and who admittedly spent a substantial amount of his time working on navigable waters, may be a person covered under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§901, *et seq.*, particularly §§ 902(3) and 905(b).

2. Whether a bridge construction company may be liable under 33 U.S.C. §905(b) for the death of a covered employee caused by the active negligence of one of the employer's vessels, a tugboat, whose unlicensed operator, a subordinate of the decedent, was not engaged in providing stevedoring services to the barge being unloaded by decedent.

PARTIES TO THE PROCEEDINGS

Respondent is dissatisfied with the Petitioner's list of parties to the proceedings as required by Rule 21.1(b) and Rule 28.1 of the Rules of this Court. Respondent respectfully suggests that the correct parties to the proceedings are:

1. Hardaway Constructors, Inc.,
   (successor to B.F. Diamond Construction Co.)
   (Petitioner)

2. Joseph Daniel Browning, Jr.,
   as Administrator De Bonis Non of the Estate of Joseph D. Browning, deceased (co-Appellee below)

3. Joseph Daniel Browning, Jr. (Respondent)
   Stewart F. Browning
   Larry Wayne Browning
   Karen B. Kirksey
   Debra B. Goodroe and
   Atwood Alan Browning,
   as survivors of Joseph D. Browning (holders of beneficial interests in judgment below)

4. Stevens Brothers, Inc.,
   (successor to South Georgia Steel Placement Co.) (co-Appellee below)

5. The Hardaway Company,
   as parent of Hardaway Constructors, Inc.

6. Fidelity & Casualty Insurance Company of New York
   (holder of alleged lien for workers' compensation payments)

7. Continental Corporation,
   as parent of an insurer of Hardaway Constructors, Inc.

8. Xerox Corporation,
   as parent of an insurer of Hardaway Constructors, Inc.

9. The North River Insurance Company
   (security on supersedeas bond posted by Hardaway Constructors, Inc.)

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JOSEPH DANIEL BROWNING, JR.,

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ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA[1]

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Joseph Daniel Browning, Jr., as Administrator De Bonis Non of the Estate of his late father, Joseph D. Browning, was the plaintiff in the original trial before the Superior Court of Muscogee County, Georgia

[1] The decision sought to be reviewed is the opinion and judgment of the Court of Appeals of Georgia attached as the Appendix to the Petition for Writ of Certiorari. The Writ of Certiorari, if granted, should be directed to that Court, not to the Supreme Court of Georgia.

and was co-appellee (with Stevens Brothers, Inc., a co-defendant in the trial court) in the proceedings in the Georgia Court of Appeals, whose judgment is sought to be reviewed. Respondent opposes the Petition for Writ of Certiorari as follows:

STATEMENT OF THE CASE

This Respondent is dissatisfied with the Petitioner's Statement of the Case. This Respondent's late father, Joseph D. Browning, was a sub-superintendent for Petitioner on the Florida bridge job and was responsible for the construction of the bridge piers or columns on navigable waters of the Gulf of Mexico. (T-8). Other sub-superintendents were in charge of driving the pilings and building the coffer dams upon which the bridge piers or columns were constructed, and another sub-superintendent was in charge of constructing the surface of the bridge on top of the bridge piers or columns. (T-8-9). In connection with this work, Mr. Browning had available to him various tugboats, crane barges, and cargo barges owned by Petitioner and operated by Petitioner's employees. Petitioner admits that a substantial amount of Mr. Browning's time was spent out on navigable waters aboard these various vessels used by Petitioner in its offshore construction work. (See Petitioner's Petition for Writ of Certiorari filed in the Supreme Court of Georgia, at 8.)

During the morning of August 24, 1978, Mr. Browning was present during the unloading and placement of two steel reinforcement bar cages from one of Petitioner's cargo barges using a crane on one of Petitioner's crane barges. (T-68-69, 518-20, 537-38). At the time of Mr. Browning's fatal injury around noon, he had walked from

one of the barges and was on one of the adjacent piling caps. Petitioner admitted during the trial that, at the time of his fatal injury, Mr. Browning was engaged in off-loading or unloading forms and other materials or preparing to. (T-438).

While Mr. Browning was preparing for this unloading operation, one of the Petitioner's tugboats, the CAPTAIN HAND, apparently ferrying another worker to the jobsite at Mr. Browning's request, came in "wide open" and hit one of the barges "hard," according to an eyewitness. (T-164). As a result of this impact, the two cages fell over crushing Mr. Browning to death.

The CAPTAIN HAND was being operated by an unlicensed operator who acknowledged that he was supposed to "always run slow around the rigs and stuff" when work was ongoing. (T-109-10). Petitioner's general superintendent, James Smith, knew that the operator did not have a license. (T-18). There is no evidence in the record that Mr. Browning knew that the operator was unlicensed.

Subsequent to Mr. Browning's death, his widow applied for death benefits under § 9 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 909 (the "Longshore Act"), on behalf of herself and Mr. Browning's two minor children against Petitioner (then known as B.F. Diamond Construction Co.). Benefits were awarded after the U.S. Court of Appeals for the Eleventh Circuit ruled that Mr. Browning was engaged in maritime employment at the time of his death and was covered under the Longshore Act and after this Court denied certiorari. *Browning v. B.F. Diamond Construction Co.*, 676 F.2d 547 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). Petitioner admitted during the trial that this was a "binding determination." (T-438).

A wrongful death action under § 5(b) of the Longshore Act was also filed against Petitioner and a sub-contractor (South Georgia Steel Placement Co.) which was tried before a jury in Muscogee County, Georgia Superior Court in June 1984, resulting in a verdict and judgment against Petitioner and in favor of Respondent, as Administrator *De Bonis Non* of Mr. Browning's estate (on behalf of all of Mr. Browning's children). The jury specifically found no negligence on the part of the co-defendant subcontractor and no negligence on the part of Mr. Browning which was the proximate cause of his death and charged the Petitioner-vessel owner with one hundred percent of the negligence. (T-621-22). The verdict and judgment have been affirmed by the Court of Appeals of Georgia. 176 Ga. App. 530, 336 S.E.2d 579 (1985).

Petitioner now seeks a Writ of Certiorari in this Court, certiorari having been denied by the Georgia Supreme Court on December 19, 1985.

SUMMARY OF ARGUMENT

Petitioner's contention that the Respondent's decedent was not a worker covered under the Longshore Act is frivolous. Prior to trial, the issue of Mr. Browning's employee status had already been fully litigated in connection with a claim for death benefits by Respondent's mother and his minor sister and brother under §9 of the Longshore Act. 33 U.S.C. § 909. This earlier proceeding resulted in a decision favorable to Respondent's position on that issue by the U.S. Circuit Court of Appeals for the Eleventh Circuit with certiorari denied by this Court. See *Browning v. B.F. Diamond Construction Co.*, 676 F.2d 547 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). Under the judicially developed doctrine of non-

mutual offensive collateral estoppel, Petitioner is foreclosed from relitigating this issue of employee status which is litigated unsuccessfully in the earlier action. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). Also, the Petitioner admitted during the trial of the §5(b) action below that Mr. Browning had been engaged in unloading a vessel, or was preparing to, when he was killed and that the Eleventh Circuit's decision was a binding determination. (T-438).

In any event, the evidence was sufficient for the jury to determine that Mr. Browning was in fact engaged in longshoring operations at the time he was killed (preparing to unload metal forms from one barge using a crane on another barge) and that he was actively engaged in vessel unloading activities on the day that he was killed (i.e., unloading construction materials from one barge using crane on another barge). It has also been admitted by the Petitioner that the deceased employee spent a substantial amount of time working on the Petitioner's various vessels during the bridge construction. Any one of these activities should support a finding of employee status under the Longshore Act.

The recent decision by this Court in *Herb's Welding, Inc. v. Gray*, 470 U.S. ___, 84 L.Ed.2d 406 (1985), is not in conflict with the decision below. Mr. Gray was a welder whose job did not involve the loading or unloading of vessels. All of Gray's work was performed on a fixed platform and not on navigable waters. However, Mr. Browning's duties in connection with the construction of the highway bridge included working both on fixed platforms and on navigable waters and involved unloading vessels. Because the *Herb's Welding* decision, although rendered after the trial of the case at bar, did not change the law with respect to workers such as Mr.

Browning, the state appellate courts below were not required to distinguish it. They were, however, made aware of it.

Because Mr. Browning was a person covered under the Act, Respondent, as the personal representative of his estate, may sue the Petitioner, even though it was Mr. Browning's employer, for negligence in its capacity as vessel owner. The fact that the Petitioner knowingly permitted its tugboat to be navigated by an unlicensed operator was negligence *per se*. Also, the evidence was sufficient for the jury to determine that the Petitioner's tugboat approached the construction site at too great a speed and negligently hit one of the barges being used in said operations.

Although the tugboat operator was a subordinate of Mr. Browning and, at the time of the accident, was bringing another worker to the jobsite at Mr. Browning's request, the operator was not "engaged in providing stevedoring services" within the meaning of § 5(b) of the Longshore Act. 33 U.S.C. § 905(b). Where there are several vessels involved, such as in the case at bar, the relevant nexus between the negligent party and the injured party is not whether they were working aboard the same vessel but whether they were working at the same task such that both would have been employed by an intermediary employer had the vessel owner chosen to contract out the work. The decision below correctly held that, had the unloading activities been contracted out, Mr. Browning would have been an employee of the stevedore while the operator of the Petitioner's vessel would have remained the agent of the Petitioner. 176 Ga. App. at 532, 336 S.E.2d at 582.

The jury specifically found that the negligence of the Petitioner's tugboat was a proximate cause of Mr. Brown-

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ing's death. Any negligence by the Petitioner, in its capacity as owner of the vessel, is sufficient to support the judgment against it for all of Respondent's damages. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 264 (1979).

ARGUMENT

I.

RESPONDENT'S DECEDENT, A BRIDGE CONSTRUCTION WORKER WORKING ON A FIXED PLATFORM IN NAVIGABLE WATERS WHICH IS PART OF A HIGHWAY BRIDGE, WAS A PERSON COVERED UNDER THE LONGSHORE ACT.

A. Redetermination Of Coverage Is Barred By Collateral Estoppel And By Admissions Of Petitioner.

Petitioner's claim that Mr. Browning is not a covered employee is frivolous. That determination had already been made by the Eleventh Circuit in *Browning v. B.F. Diamond Construction Co.*, 676 F.2d 547 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983) (hereinafter, "*Browning*"), when this case went to trial:

> The conclusion that Browning was engaged in longshoring activities cannot be avoided. It is enough that Browning was "directly involved" with the unloading of a vessel at the time of his injury . . . . Therefore we conclude that Browning was an employee within the terms of the [Longshore] Act.

Id. at 549 (citations omitted).

Although the issue of maritime employment (employee status) was raised in Petitioner's defensive pleadings and was the subject of an earlier motion for summary judgment, it was not raised as an issue during the trial, nor

was it included as an issue in Petitioner's Enumeration Errors filed in the Court of Appeals of Georgia as required by Georgia's appellate procedures statute. O.C.G.A. §5-6-40.[2]

As the Petitioner itself notes in its Petition (at 5), the jury trial of the case *sub judice* was abated until after the final determination of employee status in connection with the death benefits claim against the Petitioner under the Longshore Act. This was certainly the proper procedure and utilized the correct forum. The threshold question of whether Mr. Browning was "a person covered under this Chapter," as required by §5(b) of the Longshore Act, 33 U.S.C. §905(b), should have been, and was, determined in connection with a claim for benefits under said Act. The Longshore Act provides an administrative procedure for determining coverage and benefits from which direct judicial review is permitted. See 33 U.S.C. §§919 and 921. Those procedures were followed by Respondent's mother and minor siblings in the earlier *Browning* case from the 1980 evidentiary hearing before a U.S. Department of Labor administrative law judge to the 1983 denial of certiorari by this Court. Both Petitioner and Respondent deferred to those procedures.

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[2] O.C.G.A. §5-6-40 provides:

> The appellant and cross appellant shall file with the clerk of the appellate court, at such time as may be prescribed by its rules, an enumeration of the errors which shall set out separately each error relied upon. The enumeration shall be concise and need not set out or refer to portions of the record on appeal. It shall be served upon the appellee or cross appellee . . ., need not have approval of the trial court, and when filed shall become a part of the record on appeal. The appellate court, by rule, may permit the enumeration to be made a part of the brief.

The Browning family (collectively embodied in this Respondent) now have a vested interest in the Eleventh Circuit's favorable determination of employee status, and that decision should not be subject to further challenge.[3] This Court in *United States v. Mendoza*, 464 U.S. 154, 158-59 (1984) (hereinafter, "*Mendoza*"), said:

> Under the judicially-developed doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. *Montana v. United States*, 440 US 147, 153 . . . (1979). Collateral estoppel, like the related doctrine of res judicata, serves to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 US 90, 94 . . . (1980). In furtherance of those policies, this Court in recent years has broadened the scope of the doctrine of collateral estoppel beyond its common-law limits. Ibid. It has done so by abandoning the requirement of mutuality of parties, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 US 313 . . . (1971), and by conditionally approving the "offensive" use of collateral estoppel by a nonparty to a prior lawsuit. *Parklane Hosiery, supra.*

(Footnotes and parallel citations omitted).

The "offensive" use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party. See *Mendoza*, 464 U.S. at 159, n.4. Although this use of collateral estoppel was disapproved in *Mendoza* as

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[3] See Note 4, at p. 17, *infra.*

against the United States as a litigant, it is certainly appropriate in the case at bar between private litigants. This should especially be true where two of the affected parties (Mr. Browning's daughter Debra and son Atwood) were both claimants in the earlier contested §9 proceeding for death benefits and are also beneficiaries of the §5(b) judgment rendered below. (R-626). "This Court has long recognized that '[p]ublic policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.' " *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 401 (1981) (citation omitted).

Prior to trial, a Claim of Lien in the amount of all benefits paid "to or for the benefit of" the Respondent under the Longshore Act had been filed by Petitioner in the trial court (R-203) on behalf of Petitioner and its workers' compensation carrier against any recovery by the Respondent. This was required to protect their subrogation rights in any recovery against the co-defendant subcontractor, Stevens Brothers, Inc. (formerly South Georgia Steel Placement Co.). Although no recovery was permitted against the co-defendant, to preserve its right to such recovery Petitioner had repeatedly admitted *in judicio* that Mr. Browning was a covered employee under the Longshore Act. Its counsel admitted during the trial that the Eleventh Circuit's decision was a "binding determination." (T-438). Its counsel also admitted that at the time of the injury Mr. Browning "was engaged in offloading or unloading forms and other materials or preparing to" (T-438) and that the tugboat was bringing a worker over "to be engaged in the offloading of these forms and other material, *just as Browning was.*" (T-

439) (Emphasis supplied). Petitioner's requested jury charge (T-612) states in part: "First, I instruct you that at the time of his death Mr. Browning was engaged in unloading a vessel. This has been previously determined and is fixed as a matter of law."

Petitioner should be bound by its prior acts and admissions.

B. Respondent's Decedent Is Covered By The Longshore Act Because He Was Engaged In Longshoring Operations.

Petitioner argues that the bridge building industry was not within the contemplation of Congress when it adopted the 1972 Amendments to the Longshore Act. Respondent disagrees. As this Court noted in *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 79, n.9 (1979) (hereinafter "*Ford*"): "The legislative history of §2(3) is not extensive." However, the Act is clear on its face, and construction workers (including bridge builders) are not specifically excluded, even under the 1984 Amendments to §2(3). See Pub.L.No. 98-426, §2(a), 98 Stat. 1639 (codified as 33 U.S.C. §902(3)(A)-(H)). "Employee" is defined as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker . . . ." 33 U.S.C. §902(3). By the use of the word "including," Congress has indicated that the specifically enumerated occupations are not exclusive. See *Ford*, 444 U.S. at 77-78 n.7; *Herb's Welding, Inc. v. Gray*, 470 U.S. ___, ___ n.9, 84 L.Ed.2d 406, 414 n.9 (1985) (hereinafter, "*Herb's Welding*"). Likewise, by specifically including "*any . . . person engaged in longshoring operations*" (emphasis

supplied), Congress clearly intended to cover all workers whose duties include the loading or unloading of vessels, whether they are traditional longshoremen or maritime construction workers (such as Mr. Browning) unloading their employer's vessels. See *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 58 (11th Cir. 1981), *cert. denied*, 459 U.S. 1169 (1983) (Highway bridge construction foreman supervising unloading of construction materials on barge held to be a covered employee).

Petitioner states (at 8. n.3) that there was no unloading or crane activity at the time of injury and that there are no remaining factual controversies in this case. This is not correct. From the evidence, the jury would certainly have been warranted in finding that the crane barge activities were ongoing and that the actions of Mr. Browning on the bridge or piling cap constituted the first step in the next phase of the unloading activities (the unloading of the metal forms). In support of its Motion for Directed Verdict, Petitioner's counsel told the trial court:

> We know, your Honor, by the effort of Mr. Harris and by order of the 11th Circuit Court of Appeals that at the time of his injury, Mr. Browning was engaged in a maritime employment as used in the provisions of the Longshoremen and Harbor Workers Compensation Act.
>
> We also know that he was engaged, by order of that Court, and I submit as to the facts of this case and every other case that Mr. [Browning] might pursue against his employer, that is a binding determination. And at that time he was engaged in off loading or unloading forms and other materials or preparing to. And therefore he, we have to, in effect, then take everything that happened as though a little short film strip of activity is taken

out and considered in the context of this man off loading forms and material. (T-438).

Even if it should be believed that, at the exact moment of his fatal injuries, Mr. Browning was not engaged in longshoring operations, the evidence is uncontradicted that he was in charge of all of the activities of the crane barge and the cargo barge at this particular construction site on the day of the accident. Some of these activities clearly had involved the unloading of the two steel reinforcement bar cages from the cargo barge during the course of the morning's activities using the crane on the crane barge and the placement of those cages on the two adjoining piling caps or bridge footings. This Court in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), ruled that the Longshore Act's coverage may be defined in terms of a worker spending "at least some" of his time in indisputably longshoring operations. *Id.* at 273. In *Ford*, 444 U.S. at 83, this Court held that workers who perform "some" portion of the loading or unloading of a vessel are covered under the Longshore Act. By these constructions, this Court has sought to effectuate congressional intent to apply a simple, uniform standard of expanded coverage. *Id.*

C. Respondent's Decedent Is Also Covered Because He Spent A Substantial Portion Of His Time Working On Navigable Waters.

Although it was not the basis of the Eleventh Circuit's decision in connection with the original death benefits claim under the Longshore Act, the jury in the trial court below was also entitled to conclude from the evidence that Mr. Browning's duties as a construction sub-superintendent required him to spend a substantial amount of

time on the Petitioner's vessels supervising the erection of the bridge piers or columns as they took shape out on the water. (T-201, T-244) (R-104). This fact was admitted by Petitioner several times during the course of the proceedings below. Its initial Brief of Appellant (at 11) filed in the Court of Appeals of Georgia, its Petition for Writ of Certiorari (at 8), and its Motion for Reconsideration of Petition for Writ of Certiorari (at 8) filed in the Supreme Court of Georgia, all state that Mr. Browning

> had been employed for many years by Appellant as a superintendent/foreman who spent a substantial portion of his time working on various vessels owned by Appellant and used by Appellant in its offshore maritime construction work.

This Court in *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297 (1983), ruled that construction workers who suffer injury on navigable waters within the course of their employment are maritime employees under the Longshore Act. Coverage should not be denied to Mr. Browning simply because he had left the barge momentarily to locate the engineering points on the concrete footing. So long as he regularly spent "some" of his time on navigable waters within the scope of his employment, the fact that he was injured on an adjacent "land" area, which was brought within the coverage of the Longshore Act by the 1972 Amendments, 33 U.S.C. § § 902(4) and 903(a), should not bar recovery.

Petitioner's status as "employer" only requires one employee "employed in maritime employment, in whole or *in part* upon the navigable waters of the United States." 33 U.S.C. § 902(4) (Emphasis supplied). If Petitioner,

even though a bridge construction company, may be covered under the Longshore Act as an "employer" if it had just one employee who was employed "in part" upon navigable waters, then surely Mr. Browning, who admittedly worked part of the time on navigable waters, could be considered by the jury as such an employee.

D. *Herb's Welding Inc. v. Gray* Is Not In Conflict With The Decision Below.

Petitioner claims that the decision below conflicts with this Court's *Herb's Welding* decision which was rendered after the trial of the case at bar and while it was on direct appeal.

Herb's Welding is simply not in conflict with the decision below. This Court, in *Herb's Welding*, was presented with the question of whether a worker on a fixed offshore drilling rig, because of his offshore employment at a covered situs and in a maritime environment, was an "employee" under the Longshore Act. A similar question had been raised by this Respondent's predecessor before the Eleventh Circuit concerning bridge construction workers on navigable waters, and that court found it unnecessary to address the question because the court agreed that Mr. Browning was directly engaged in unloading activities at the time of his injury. See *Browning*, 676 F.2d at 549 n.2.

This Court ruled in *Herb's Welding* that § 2(3), added by the 1972 Amendments to the Longshore Act, requires more than a maritime situs. The purpose of the Longshore Act is to cover workers who are involved in the "essential elements of loading and unloading." 84 L.Ed.2d at 414. This Court held that there was no coverage because Mr. Gray's work as a welder on the drilling rig "had nothing

to do with the loading or unloading process, nor is there any indication that he was even employed in the maintenance of equipment used in such tasks." 84 L.Ed.2d at 415. Apparently, the only thing unloaded by Mr. Gray was his own personal gear upon arrival at the platform by boat. Mr. Browning's work was clearly different from Mr. Gray's because Mr. Browning was involved with various unloading activities. As the dissent in *Herb's Welding* points out: "Even under the analysis used by the Court today, [a worker killed using a crane to unload a barge that was docked at a fixed offshore platform] would be 'engaged in maritime employment.' " 84 L.Ed.2d at 421 n.6 (Marshall, J., dissenting).

This Court also noted in *Herb's Welding* that there is a substantial difference between a worker such as Mr. Gray (whose job was entirely land-based) who takes a boat to work and a worker "performing a set of tasks requiring him to be both on and off navigable waters." 84 L.Ed.2d at 416 n.13. Mr. Browning was exactly the latter type of worker whose job required him to perform tasks both on and off navigable waters and who Petitioner admits spent a substantial amount of his time working on navigable waters on the Petitioner's vessels.

The Court of Appeals of Georgia and the Supreme Court of Georgia were both made aware of the *Herb's Welding* decision by the Petitioner, and its relevance to the case at bar was exhaustively briefed and argued. Neither of those courts apparently felt that a discussion of *Herb's Welding* was required. It was not referred to in any of their decisions or orders. This Respondent respectfully submits that the state appellate courts are not required to discuss every decision of this Court simply because one of the parties wants them to. The case of *Gulf*

Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 486 n.16 (1981), cited by Petitioner (at 6), stands only for the proposition that, where a change in the law occurs while a case is on direct appeal, the appellate court should apply the law in effect at the time it renders its decision.[4] It does not stand for the proposition that every recent decision by this Court which a party deems significant must be distinguished by the appellate courts in their decisions. It is sufficient if those courts were made aware of the new decision, as they were in this case as stated by Petitioner (at 5-6). *Herb's Welding* involved a different set of operative facts from the case at bar and did not change the law in regard to construction workers such as Mr. Browning who are engaged in unloading vessels and who spend substantial time working on navigable waters.

II.

PETITIONER IS LIABLE UNDER §5(b) OF THE LONGSHORE ACT FOR THE DEATH OF RESPONDENT'S DECEDENT CAUSED BY THE NEGLIGENCE OF PETITIONER'S VESSEL WHOSE UNLICENSED OPERATOR, A SUBORDINATE OF DECEDENT, WAS NOT ENGAGED IN PROVIDING STEVEDORING SERVICES.

A. Petitioner, As Employer-Vessel Owner, Is Liable Under §5(b) For Fatal Injuries To Respondent's Decedent Caused By Its Negligence As Vessel Owner.

This Court in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983) (hereinafter, "*Jones & Laughlin*"), recognized that under § 5(b) of the Longshore Act, 33 U.S.C. § 905(b), a separate action based on negligence is authorized against a vessel owner even where there is

[4] The general rule, according to the Eleventh Circuit, is that even changes in the law after final judgment, unless they involve signif-

[footnote continued]

no independent stevedore and the longshoreman is employed directly by the vessel owner. The only exception under § 5(b) which would be applicable to the case at bar is if the person covered under the Longshore Act were employed by the vessel "to provide stevedoring services" (longshoring operations) and the injury were caused by the negligence of persons engaged in providing stevedoring services to the vessel. In other words, if a vessel owner acts as its own stevedore, it is liable only for negligence in its "owner" capacity, not for negligence in its "stevedore" capacity. See *Jones & Laughlin*, 462 U.S. at 531, n.6.

Petitioner is mistaken in its interpretation of this Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981) (hereinafter, "*Scindia*"). That decision does not mandate, as Petitioner suggests (at 13), that vessel liability must be distinct from the ongoing activities of the employer. *Scindia* was concerned only with the liability of a vessel for dangerous conditions which develop during third party stevedoring operations.[5] In fact, in *Scindia*, this Court said:

> It is also accepted that the vessel may be liable if it actively involves itself in the cargo operation and

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icant changes in important, fundamental *constitutional* rights, do not preclude the application of *res judicata* or collateral estoppel, despite the fact that the grounds on which the decision was based are subsequently overruled. See *Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1503-04 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 966 (1985).

[5] See *Fanetti v. Hellenic Lines, Ltd.*, 678 F.2d 424, 428-30 (2d Cir. 1982), *cert. denied*, 463 U.S. 1206 (1983), in which the Second Circuit, distinguishing *Scindia*, ruled that by choosing to act as its own stevedore, a vessel owner forfeits any insulation from its own negligent acts who might be available had it hired an expert, independent stevedoring contractor which would then be responsible for correcting hazardous shipboard conditions.

> negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel, during the stevedoring operation.

Id. at 167.[6]

It is the antecedent negligence of the Petitioner in permitting an unlicensed operator to operate its tugboat and the active negligence of the Petitioner's tugboat, navigated by the unlicensed operator, in striking the barge which renders the Petitioner liable here. *Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243, 1247 (5th Cir. 1982), distinguishing *Scindia*, held that the active (as opposed to passive) negligence of a vessel may breach a duty owed a longshoreman by the vessel. See also *Brown v. Hellenic Lines*, 153 Ga. 465, 466, 322 S.E.2d 48, 49 (1984), where the Georgia Supreme Court, citing *Scindia*, held that a vessel owner has, in addition to the duty relied on by the Petitioner, the duty to refrain from active negligence. It was this duty to refrain from active negligence which was breached in this case when the employer provided Mr. Browning with an unlicensed operator and that person navigated Petitioner's tugboat into the barge "wide open" and hit it "hard." (T-164). See *Duncan v. Dravo Corp.*, 426 F.Supp. 1048 (W.D. Pa. 1977) (employer may be liable under § 5(b) for injuries to its longshoreman employee caused by employer's tugboat bumping its barge on which employee was working).

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[6]This ruling negates Petitioner's theory, discussed at pp. 20-23, *infra*, that it is somehow insulated from liability for the negligent operation of its tugboat if that vessel were involved in the stevedoring operation. To be "peripherally" involved is not sufficient to bar liability of the vessel owner. See *Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789, 796, n.5 (2d Cir. 1979).

B. Petitioner's Tugboat Operator Was Not Engaged In Providing Stevedoring Services.

There was sufficient evidence for the jury to conclude that Mr. Browning and the operator of the Petitioner's tugboat were not performing the same longshoring or stevedoring work at the time that Mr. Browning was killed. It is undisputed that Mr. Browning was down on the bridge or piling cap marking the engineering points and getting ready to unload the metal forms that afternoon, while the tugboat operator was improperly navigating his tugboat. They were not engaged in the same activity. The tugboat operator was not engaged in the actual unloading activities.

No doubt Mr. Browning and the tugboat operator were both employees of Petitioner and engaged in bridge building. But, as this Court said in *Jones & Laughlin*, 462 U.S. at 530-31:

> If § 5(a) had been intended to bar all negligence suits against owner-employers, there would have no need to put an additional sentence in § 5(b) barring suits against owner-employers for injuries caused by fellow servants [engaged in providing stevedoring, shipbuilding or ship repairing services to the vessel].

As pointed out in the decision below, the "relevant nexus" between the negligent party and the victim is not whether they were working aboard the same vessel but whether they were working at the same task such that both would have been employed by an intermediary employer had the vessel owner chosen to contract out the work. 176 Ga. App. at 532, 336 S.E.2d at 582, citing *Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789, 796 n.7 (2d Cir. 1979) (hereinafter, "*Smith*"). Petitioner tries to analogize the role of the tugboat operator to a longshoreman operating a tractor on the docks.

However, a better analogy would be to a cab or bus driver delivering a longshoreman to the docks. An unlicensed tugboat operator ferrying employees engaged in maritime employment to and from an offshore jobsite, may be held liable under § 5(b) for operational negligence. See *Duty v. East Coast Tender Service, Inc.*, 660 F.2d 933 (4th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982) (hereinafter, "*Duty*").

The court below correctly ruled that, had the longshoring activities being supervised by Mr. Browning been contracted out, he would have been an employee of the stevedore while the operator of Petitioner's vessel would have been Petitioner's agent. 176 Ga. App. at 532, 336 S.E.2d at 582. Conversely, had the ferrying of its personnel to offshore jobsites been contracted out by the Petitioner as barge owner, Mr. Browning would no doubt have been an employee of the barge owner, while the tugboat operator would have been an agent of the tugboat owner. A similar contractual arrangement was in effect in the *Duty* case.

Petitioner seeks to deny liability under § 5(b) if the death of an employee is caused by the operational negligence of a fellow employee under the decedent's control. However, as discussed in the decision below, the tugboat operator and the decedent were not involved in a single mission which would have precluded this Respondent's suit against Petitioner. 176 Ga. App. at 532, 336 S.E.2d at 582. They were not both involved in providing stevedoring services. The tugboat operator was negligently navigating the Petitioner's vessel. He was not directly engaged in providing any stevedoring services as such, although the worker he was delivering to Mr. Browning might have been scheduled to be so engaged. Mr. Browning was not on the tugboat. He, therefore, had no direct control over its actual navigation.

An even stronger factual situation favoring Petitioner's position occurred in the *Smith* case where the president of the employer company was actually on board, supervising the tugboat, and was directly in charge of the employee diver who had entered the water from the tugboat to examine the company's sunken dredge. Despite this relationship of supervisor-subordinate, the Second Circuit held that they were not both involved in the same activity which would bar recovery under § 5(b). The "single mission" theory, which Petitioner has repeatedly espoused in the proceedings below and which it continues to espouse here in the guise of an overall ban on liability under § 5(b) for the negligence of fellow servants or fellow employees, should be rejected. The analogy the Second Circuit made in the *Smith* case to the longshoring situation is most applicable to the case at bar:

> The flaw in the "single mission" analysis can be illustrated by analogy to the longshoring context. At the time that a ship is being loaded, all employees are in a sense involved at least peripherally in this single mission. Nevertheless, supervisory personnel in particular will continue to fulfill their general duties as agents of the shipowner and the negligent discharge of their responsibilities shall still result in liability to the ship.

604 F.2d 796 n.5.

The scope of § 5(b) is not as narrow as the Petitioner would have this Court believe. Once it has been established that the employee is a "person covered under this [Act]" and that his death was caused by the antecedent or active negligence of the employer's vessel, liability, in the longshoring context, can be avoided only if the negligence were caused by another worker also providing stevedoring services. The jury below was specifically asked: "Do you find by a preponderance of the evidence

that there was negligence on the part of Defendant Hardaway Constructors, Inc.'s tugboat, CAPTAIN HAND, that was a proximate cause of the death of Joseph D. Browning?" And the special jury verdict was "yes." (T-621). The evidence is uncontradicted that prior to the accident the Petitioner had knowingly provided Mr. Browning with an unlicensed tugboat operator to navigate its vessel. This is negligence *per se*. See *Duty*, 660 F.2d at 947. The jury was entitled to find that this antecedent negligence was a proximate cause of the ensuing collision of the tugboat with the barge. See *Chaisson v. Rogers Terminal and Shipping Corp.*, 679 F.2d 410, 415 (5th Cir. 1982). ("The jury could reasonably find that the negligent failure to provide a stern winch constitutes dereliction of [Defendant-Employer] Rogers' duties as a vessel owner.")

Even if Petitioner were negligent only partly as owner and partly as stevedore, its negligence as owner, however slight, will support the judgment against it for all of Respondent's damages. See *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 264 (1979); see also, *Pichoff v. Bisso Towboat Co.*, 748 F.2d 300, 303 n.4 (5th Cir. 1984), and *Smith*, 604 F.2d at 796-97.

The decision of the Georgia Court of Appeals does not conflict with any decision of this Court or of another state court of last resort or of a federal court of appeals and is in complete accord with the requirements of § 5(b) of the Longshore Act.

CONCLUSION

For the foregoing reasons, Respondent prays that the Court deny the Petition for Writ of Certiorari and that he be awarded appropriate damages under Rule 49.2 of this Court should it be determined that the petition is frivolous.

Respectfully submitted,

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